TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 257.

MORRIS KEIM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 13, 1903.

(16,848.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1898.

1 In the Court of Court of Claims.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

I.—*Petition.*

On the 25th day of July, 1895, the claimant filed his original petition. By leave of court he, on the 7th day of October, 1895, filed an amended petition, and on the 27th day of December, 1895, he filed a second amended petition, which is as follows:

Second Amended Petition.

Filed December 27, 1895.

Your petitioner, Morris Keim, for his second amended petition herein, respectfully represents:

1. That he is a citizen of the United States, residing in Farmwell, Loudoun county, State of Virginia, has always yielded true allegiance to the Government of the United States of America, and is the owner of the claims hereinafter sued on, never having sold or assigned the same, or any part thereof, to any person or persons.

2. That on the 26th day of August, 1862, he enlisted and was mustered into the military service of the United States, in Company I, 154 New York volunteer infantry, serving therein for the suppression of the rebellion, up to the 25th day of January, 1865, on which last-named date he was duly transferred to the 154th company of the second bat-al*l*ion, veteran reserve corps, and was honor-
2 ably discharged therefrom on the 17th day of April, 1865, at Nashville, Tenn., by order of Major General George H. Thomas, "by reason of" the regimental surgeon's certificate of "disability from *inguinal hernia*, contracted from excessive labor while under military orders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

3. That on the 7th day of May, 1888, upon examination by the Civil Service Commission, he was duly appointed to a clerkship in the Post-office Department, in class —, in the division known as the money-order office, at an annual salary of $900.00, which position he held up to February 4, 1889, when he was at his own request, duly transferred to the Treasury Department, and was assigned to the branch then known as the Sixth Auditor's office, at the salary of $900.00 per annum; that on the 31st day of October, 1890, he was, upon examination, duly promoted to class 1, in said Sixth Auditor's office, which clerkship he held up to March 16, 1893; that on the said 16th day of March, 1893, he was, at his own request, on the certification of the Civil Service Commission, transferred to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau, at the salary of $1,200 per year, which he con-

tinued to hold until March, 1894, and at this salary continued in said bureau as such clerk, but was reduced, to the salary of $1,000 per annum, on or about the 1st day of March, 1894, at which last-named salary he continued to serve as such clerk up to July 31, 1894, when he was formally discharged from said service, without any fault of his own, and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at all times, since said last-named date, stood ready and willing to
3 discharge the duties thereof; that the Secretary of the Interior upon the recommendation of the Commissioner of Pensions, which recommendation was based upon false and fraudulent representations by his subordinates, as to the efficiency record of your petitioner, directed his discharge from said office as aforesaid; that, at the time of his said discharge, the requirements of the public service in said Pension Bureau demanded the retention of your petitioner, and his said services are now required therein; that the Secretary of the Interior upon the recommendation of the Commissioner of Pensions, did retain, at the time of the discharge of your petitioner, as aforesaid, and now retains one Charles E. Bookwalter, and other clerks of the same division, who have received since his said discharge, and are now receiving the same salary, to wit, $1,000 per annum (except that said Bookwalter receives $1,200 per annum) who have not been honorably discharged from the military or naval service of the United States, and who were not found, at the time of petitioner's said discharge, to possess better business capacity for the proper discharge of the duties of their said offices, than the required qualifications for said duties possessed by your petitioner at the time of his said discharge; that on or about the day your petitioner received notice of his said discharge, additional clerks were appointed to duties in the same division in which petitioner served in said bureau, who were not honorably discharged from the military or naval service of the United States, and who never rendered any military or naval service whatever.

4. Your petitioner further says, that he was efficient in the discharge of his duties as such clerk, and was able to, and did, discharge with efficiency, the said duties; that he was faithful in his attendance upon his said duties, sober and industrious
4 therein, and fell short of nothing with regard thereto; that the efficiency record ordered to be, and which was, kept in said Pension Bureau, will show that your petitioner possessed the business capacity necessary for the proper discharge of the duties of his said office, both prior to, and at the time of, his said discharge; and that he did, at the time of his said discharge and does now, possess the necessary business capacity for the proper discharge of the duties of his said office.

5. For first cause of action herein, your petitioner alleges, that, during the time he was such clerk in the Pension Bureau, he faithfully discharged all the duties required of him in the month of July, 1894; that he was not absent from said bureau in and during

the calendar year 1894, more than thirty days' "annual leave," and thirty days' "sick leave," prior to his said discharge as aforesaid; that he was and is entitled to an annual salary of $1,000; and, during said month of July, 1894, was and is entitled to the sum of $84.20, payable semi-monthly, according to the practice of the Pension Office; that instead of said sum of $84.20, on account of salary, as aforesaid, he received the sum of $48.90, leaving due him from the defendant, and wholly unpaid, $35.30, which sum has been refused him, although payment thereof has often been requested.

6. For second cause of action herein, your petitioner alleges, that there is justly due him from the United States, the salary of his said clerkship, from the 31st day of July, 1894, to this date, to wit: $1,000 per annum, or a total sum due and unpaid, as such salary, of $1,375.00 under the act entitled "An act to regulate and improve the civil service of the United States," approved January 16, 1883, and acts amendatory thereof, and also under section 1754, R. S. U. S., and the statutes supplemental thereto, found at page 120, Supplement R. S. U. S., volume 1.

7. And your petitioner says, that there remains due and unpaid to him, from the defendant, on account of both said causes of action, the sum of fourteen hundred, ten dollars and thirty cents.

Wherefore, your petitioner demands judgment against the defendant in the sum of $1,410.30 and all proper relief in the premises.

MORRIS KEIM, *Petitioner.*

DISTRICT OF COLUMBIA, *City of Washington,* } ss:

Morris Keim, being duly sworn, upon his said oath says: That he is the petitioner in the above-entitled cause; that he has read the foregoing petition and understands the same; that the matters therein stated on his personal knowledge are true, and that those matters therein stated upon information and belief, he believes to be true.

MORRIS KEIM.

Subscribed and sworn to before me this 27th day of December, 1895.

GEO. E. TERRY,
Notary Public, D. C.

[SEAL.]

LUTHER R. SMITH,
Claimant's Attorney (Warder Building).

CHANEY & GARRISON,
Of Counsel, 1320 *F Street.*

On January 2, 1896, the defendants filed their demurrer to this petition; which was overruled by the court March 2, 1896, and on March 9, 1896, the defendants filed a general traverse to said petition.

6 II.—*Traverse to Second Amended Petition. Filed March* 9, 1896.

In the Court of Claims of the United States.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

And now comes the Attorney General, on behalf of the United States, and answering the 2nd amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and ha- not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney General.

7 III.—*Findings of Fact and Conclusion of Law. Filed January* 3, 1898.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

Morris Keim, the plaintiff, is a citizen of the United States.

II.

August 26, 1862, he enlisted and was mustered into the military service of the United States, in Company I, One hundred and fifty-fourth New York volunteer infantry, serving therein during the late war to January 25, 1865, when he was duly transferred to the One hundred and fifty-fourth company of the second battalion veteran reserve corps, and was honorably discharged therefrom April 17, 1865, at Nashville, Tenn., by order of Maj. Gen. George H. Thomas, "by reason of disability from inguinal hernia, contracted from excessive labor while under military orders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

III.

May 7, 1888, after examination by the Civil Service Commission, he was appointed to a clerkship in the Post-office Department, in the division known as the money-order office, with salary at the rate of $900, which position he held until February 4, 1889, when he was, at his own request, transferred to the Treasury Department

and assigned to the branch then known as the Sixth Auditor's office, with salary at the rate of $900 per annum; October 31, 1890, he was, upon examination, promoted to class 1 in said Sixth Auditor's office, which clerkship he held until March 16, 1893; he was then, at his own request and on the certificate of the Civil Service Commission, transferred to the Department of the Interior and assigned to a clerkship in class 1 in the Pension Bureau, with salary at the rate of $1,200 per year, which he held until March, 1894. March 1, 1894, his salary was reduced to $1,000 per annum, at which salary he continued to serve to July 31, 1894, when he was discharged, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has stood ready and willing to discharge the duties thereof.

IV.

At the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of a clerk in plaintiff's place; the Secretary of the Interior, upon the
8 recommendation of the Commissioner of Pensions, retained at the time of plaintiff's discharge, and now retains, other clerks of the same division who have received since plaintiff's discharge, and are now receiving, the same salary, to wit, $1,000 per annum (one receiving $1,200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who are not shown to this court, except as in these findings set forth, to have possessed at the time of plaintiff's discharge better or inferior business capacity for the proper discharge of the duties of their said offices than the qualifications for the said duties possessed by plaintiff at that time. On or about the day plaintiff received notice of his discharge additional clerks were appointed to duties in the same division in which he served in said bureau who never rendered any military or naval service. It does not appear that any of these clerks were regarded or reported as inefficient by any superior officer; nor does it appear that those so retained or those thereafter appointed possessed better, or equal, or inferior qualifications for the discharge of the duties of their respective offices than those possessed therefor by the plaintiff.

V.

The order of discharge bore this indorsement signed by the Commissioner of Pensions:

The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him.

WM. LOCHREN,
Commissioner.

July 14, 1894.

VI.

There is no evidence that plaintiff made any effort to secure other employment, or that he has, or has not, been employed at any kind

of work from and after his said discharge July, 1894. Nor is there evidence as to the difference in amount between his salary while in the Government service and any moneys he might have earned or could have reasonably earned or has earned in other ways since his said discharge.

Additional Finding.

Plaintiff requests the court to make the findings of fact hereto annexed. Except as hereinbefore set forth, the court decline to accede to these requests, deeming said requested findings, if true, to be irrelevant to the issue presented as set forth in the opinion of the court:

1. That Morris Keim, the petitioner, is a citizen of the United States, residing at Farmwell, Loudoun county, Va, and has always yielded true allegiance to the Government of the United States.

2. That on the 26th day of August, 1862, he enlisted and was mustered into the military service of the United States, in Company I, One hundred and fifty-fourth New York volunteer infantry, serving therein, for the suppression of the rebellion, up to the 25th day of January, 1865, on which said last-named date he was duly transferred to the One hundred and fifty-fourth company of the second battalion, veteran reserve corps, and was honorably discharged therefrom April 17, 1865, at Nashville, Tenn., by order of Maj. Gen. George H. Thomas, "by reason of disability from inguinal hernia, contracted from excessive labor while under military orders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

3. That on the 7th day of May, 1888, upon examination by the Civil Service Commission, he was duly appointed to a clerkship in the Post-office Department, in class —, in the division known
9 as the money-order office, at an annual salary of $900, which position he held up to February 4, 1889, when he was at his own request duly transferred to the Treasury Department, and was assigned to the branch then known as the Sixth Auditor's office, at the salary of $900 per annum; that on the 31st day of October, 1890, he was, upon examination, duly promoted to class 1, in said Sixth Auditor's office, which clerkship he held up to March 16, 1893; that on the said 6th day of March, 1893, he was, at his own request, on the certificate of the Civil Service Commission, transferred to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau at the salary of $1,200 per year, which he continued to hold until March, 1894, and at this salary continued in said bureau as such clerk, but was reduced to the salary of $1,000 per annum on or about the 1st day of March, 1894, at which last-named salary he continued to serve as such clerk up to July 31, 1894, when he was formally discharged from said service, without any fault of his own, and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at all times, since said last-named date, stood ready and willing to discharge the duties thereof.

4. That at the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of your petitioner, and his said services are now required therein; that the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, did retain, at the time of the discharge of your petitioner, as aforesaid, and now retains one Charles E. Bookwalter, and other clerks of the same division who have received since his said discharge, and are now receiving the same salary, to wit, $1,000 per annum (except that said Bookwalter receives $1,200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who were not found, at the time of petitioner's said discharge, to possess better business capacity for the proper discharge of the duties of their said offices than the required qualifications for the said duties possessed by your petitioner at the time of his said discharge; that on or about the day your petitioner received notice of his discharge additional clerks were appointed to duties in the same division in which your petitioner served in said bureau, who were not honorably discharged from the military or naval service of the United States, and who never rendered any military or naval service whatever.

5. That petitioner was, at the time of his so-called discharge, an efficient clerk, and discharged his duties faithfully and efficiently, and at the time of his said discharge he possessed and now possesses the necessary business capacity for the proper discharge of the duties of said clerkship.

6. That there is due petitioner for and on account of services rendered by him in the month of July, 1894, $35 30, if it shall be found that same was improperly and illegally withheld from him.

7. That there is due the petitioner upon the "second amended petition," if he shall be deemed illegally deprived of his office, on account of annual salary at the rate of $1,000 per annum, since July 31, 1894, $1,375.

Conclusion of Law.

Upon the foregoing findings of fact the petition will be dismissed.

IV. *Opinion of the Court.*

DAVIS, J., delivered the opinion of the court:

The plaintiff served in the army during the late war and was honorably discharged. Later, and after a civil-service examination, he was made a clerk in an executive department; then (at his request) he was transferred to another department; there he secured promotion; then he was (following his wish) transferred to the Department of the Interior and assigned to duty as a clerk in the Pension Bureau, where our interest in him begins; later he was reduced in rank, and still later he was discharged.

The discharge he alleges to have been without fault or deficiency on his part.

The following order was signed by the Commissioner of Pensions:

The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him.

The substantial point in the case concerns the power of the court to examine into the course of an officer of a principal executive department of the United States in advancing or degrading or dismissing a subordinate who has entered the executive service through the recommendation of the Civil Service Commission and who is also an honorably discharged soldier.

Defendants assert that the plaintiff was not sufficiently competent. This is denied, and an effort is made to show that he was competent; that he was dismissed for other reasons than lack of sufficient ability, and that (in any event) he was not given the preference to which on (otherwise) even terms the former soldier is entitled.

The statutes provide:

Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices. (Sec. 1754, R. S.)

That whenever in the judgment of the head of any department the duties assigned to any clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of the clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service: *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors. (Sec. 3, Supp. to R. S., vol. 1, p. 120; act 15th August, 1876, 19 Stat. L., 169, sec. 3.)

The plaintiff relies upon the act of August 15, 1876, above quoted, contends that the proviso is mandatory and the acts done under it may be the subject of judicial determination. The first line of the section expressly states that the comparative performance of certain clerks shall be determined by "the judgment of the head of any department." In the proviso a comparison is also directed between persons who may be equally qualified to perform the duties which may be assigned to them; that is, between clerks who have been in the military or naval service and those who have not been in either service. To entitle the former to retention in service they must be equally qualified. The statute does not say whether this shall be determined by the records of an executive department or by the courts. By whom shall it be determined? The enacting clause of the section (act of 1876) answers the inquiry by saying that it shall be determined by the "judgment" of the head of the department. It is not correct to say that one rule is prescribed by the enacting clause and a different rule by the proviso. The judgment of the

head of the department is as applicable in the one class of cases as in the other; and the qualifications of the clerk to be appointed in the one class or of the clerk to be retained in the other are necessarily matters committed to the judgment of the head of the department within the intent and meaning of the statute.

The first question we have to consider is as to our power. May a court enter an executive department, examine the acts of the principal officer, inquire into his exercise of discretion, put him, in effect, upon the witness stand, and investigate the reasons which influenced the exercise of this discretion?

11 The plaintiff seeks to show that other clerks were less efficient than he, and that these clerks were retained while he was discharged; but who is to decide as to this efficiency, the superior administrative officer, responsible for the efficient conduct of his office, and dependent upon this for his reputation and tenure; the officer presumably competent and upright and always subject to still superior executive control and legislative supervision; is he to decide this, or are the courts?

The civil-service laws provide for entrance into Government employ; they direct that (other things being equal) the soldier shall have preference, but some one in authority must in each instance decide whether the former soldier has placed himself in such a position of equality with his colleagues as to be entitled to the statutory advantage.

In our opinion there is but one question presented in this record, to wit: Is a court to decide whether a clerk has so performed his work as to bring himself within the protected class, or have that clerk's executive superiors the power and the duty to make that decision, and to make it finally?

The plaintiff had a right "to be preferred for appointment" if found to possess the necessary business capacity. It might be urged that as he was in fact appointed, power under this statute was exhausted. We need not discuss that point; the case is too important to pause at a slight issue. The purport and intent of the law is evident and admitted that the soldier, under equal conditions, shall be favored. But who is to decide as to this equality? Who is to say whether any one individual is equally efficient with his rival? Is this power lodged in the superior executive officer, or are the courts to investigate the record not only of clerks discharged or clerks reduced in pay, but also to compare their records with those of their colleagues or rivals, and then to decide judicially that the superior executive officer has erred and has discharged or promoted the wrong man?

As a broad principle, the power to appoint implies the power to remove (People *ex rel.* McCullough *v.* Cram., 36 N. Y. Sup. Ct., 1117). The Supreme Court of the United States (*Ex parte* Hennen, 13 Peters, 230; Parsons *v.* U. S., 30 C. Cls., 222, and 167 U. S., 324) have held:

There can be no doubt that these clerks hold their office at the will and discretion of the head of the department. It would be a most extraordinary construction of the law that all these officers

were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department.

The power to appoint has been limited by the civil-service laws; the power to remove, however, remains unimpaired in the executive except for this, that (other things being equal) the removing power must retain the man who has served during the war as a soldier; so again we reach the point of this case which (although much else has been said) simply is:—who is to decide?

If the courts can examine these questions, if every discharged clerk can by an appeal to the judiciary possibly override his chief and be reinstated in an office for which his chief deems him incompetent, the discipline of the departments is seriously impaired. In *Chisholm's case* (27 C. C., p. 98), this court held "upon such questions as these the executive officers can alone decide; they
12 are questions of discretion which in their nature belong to those having the responsibility." The officers of the Government are carefully selected; the head of the principal executive departments and of the important bureaus are trained men of broad experience and national reputation; to spare them certain pressure and responsibility and in an effort to improve the subordinate civil service the statutes now under consideration were passed; but these statutes relate only to selection for appointment, and do not touch upon the power of removal except that (other things being equal) the soldier shall be retained.

The superior executive officer decides as to the removal. The law controlling him is the unwritten law of fairness, justice, kindness, and honesty, and also the written law that (other things being equal) the soldier shall be preferred. The supervision of this purely executive power is not intrusted to the judicial branch of the Government of the United States.

Petition dismissed.

Weldon, J., concurs in the judgment *pro forma* in order that the case may be decided by the Supreme Court.

(Howry, J., took no part in the decision of this case.)

Dissenting Opinion.

PEELLE, J., dissents for the following reasons:

The facts found by the court (2 and 3) clearly bring the claimant within the class of persons preferred for appointment under Revised Statutes, section 1754, about which there is no controversy; while finding 4 is apparently sufficient to bring him within the class of persons preferred for retention under the act of 1876. But if not the facts requested by the claimant and refused to be found by the court, though set out *in extenso*, because not deemed relevant to the issue, clearly do.

At the time of the claimant's appointment and during his service as such clerk there existed the following statutes:

Revised Statutes:

SEC. 1754. Persons honorably discharged from the military or

naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices.

Section 3, act of August 15, 1876 (Supp. Rev. Stat., vol. 1, p. 120):

SEC. 3. That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service:

Provided, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors.

Section 7, act of January 16, 1883 (22 Stat. L., 403, Supp. Rev. Stat., vol. 1, p. 395):

SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith.

But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes.

The claimant's right depends upon the proper construction to be given to the proviso to section 3, act of August 15, 1876 (*supra*), in connection with section 1754, preserved by the civil-service act.

The theory of the court's opinion is that even if the facts which it refuses to find, though set out *in extenso*, are true, still the result must be the same, for the reason that "whether a clerk has
13 so performed his work as to bring himself within the protected class," for retention on the reduction of force, is a question within the supervision of "purely executive power," and not therefore "entrusted to the judicial branch of the Government."

In other words, that the interpretation and enforcement of the statute "shall be determined by the 'judgment' of the head of the department," and is not therefore within the jurisdiction of the courts.

By the act of March 3, 1887, section 1 (24 Stat. L., 505, 1 Supp. Rev. Stat., p. 559), it is provided "that the Court of Claims shall have jurisdiction to hear and determine the following matters:

All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or im-

plied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.

If, therefore, the statute of 1876 is one upon which a claim can be founded, this court has jurisdiction under the act of 1887 "to hear and determine" it.

If the claimant acquired any right under the preference statutes quoted of which he was illegally deprived, to his damage, then his claim is well founded, and the court has jurisdiction to hear and determine it.

Under the act of 1876 it is for the head of a department to determine whether "the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class or by a female clerk," and if, in his judgment, it can be done, "it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of clerks of the lower grade within the limits of the total appropriation for such clerical service." But having gone that far, the Congress saw that the purpose of the preference given in appointments by section 1754 might be taken away, and so they added the proviso, excepting from the operation of the statute such preferred class for retention, thereby limiting the power of removal in respect of such preferred class by providing "that the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States." Not that he may or may not in his judgment retain such, but that he "shall retain."

It was not intended by the proviso to establish a new rule for the ascertainment of the business capacity or qualifications necessary to entitle such preferred class to retention or to submit to the judgment of the head of a department the question as to the qualifications of those preferred for appointment under section 1754. The purpose of that section should not be defeated in the execution of the act of 1876, but rather effectuated, and in case of conflict the former should prevail, as it was in express terms preserved by the civil-service act; besides, the legislation was intended for the benefit of such preferred class, and good faith requires that the preference given by statute to those so honorably discharged should not be taken away for slight or transient causes, nor should technicalities intervene to defeat the purpose of Congress in reference thereto.

The claimant having been honorably discharged from the military service of the United States and having been appointed after a civil-service examination pursuant to law, the presumption is that he possessed the business capacity necessary for the proper discharge of the duties of the service into which he entered, and he was therefore entitled to retention in the reduction of force; but aside from such presumption the findings set out, and refused to be found because deemed irrelevant, clearly establish the claimant's efficiency as a clerk, and that being so, he must have been "equally qualified" as matter of fact with those so retained. Such being his

status at the time of his discharge, he was entitled, under the act of 1876, to be retained.

I am dealing with a statute which in express terms prefers for retention a specified class, and if that statute is to be enforced, as manifestly intended by Congress it should be, then the discharge of the claimant at the time and under the circumstances of this case was in violation thereof, and that being so, he was deprived of a right thereunder, *i. e.*, the right to be retained in his position and to continue to enjoy the salary provided therefor by law.

The claimant having brought himself within the provisions of the statute as one entitled to retention, and having been deprived of his office or employment to his damage, *i. e.*, the loss of the salary provided therefor by law, his claim is one which this court may "hear and determine," under the act of 1887 (*supra*), as a claim arising under a statute.

14 V.—*Order as to Amendment of Petition and Suspending Entry of Judgment. Filed January* 3, 1898.

It is ordered that leave be granted the claimant (should he so elect) to amend his petition within two weeks by increasing the amount claimed to what would be now due were the decision in his favor, and that the entry of judgment to be made herein dismissing the petition be suspended pending the time granted for said amendment.

BY THE COURT.

15 In the Court of Claims of the United States, Term 1897–'98.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

VI.—*Amended Petition. Filed by Leave of Court January* 8, 1898.

Your petitioner, Morris Keim, for amended petition herein respectfully represents:

1. That he is a citizen of the United States, resident in Farmwell, Loudoun county, State of Virginia, living temporarily at 812 Maryland Ave. N. E., Washington, D. C.; has always yielded true allegiance to the Government of the United States of America, and is the owner of the claims hereinafter sued on, never having sold or assigned the same or any part thereof to any person or persons.

2. That on the 26th day of August, 1862, he enlisted and was mustered into the military service of the United States, in Company I, 154 New York volunteer infantry, serving therein for the suppression of the rebellion up to the 25th day of January, 1865, on which last named date he was duly transferred to the 154th company of the second battalion, veteran reserve corps, and was honorably discharged therefrom on the 17th day of April, 1865, at Nashville, Tenn., by order of Major General George H. Thomas,

"by reason of" the regimental surgeon's certificate of "disability from inguinal hernia, contracted from excessive labor while under military orders, at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

3. That on the 7th day of May, 1888, upon examination by the Civil Service Commission, he was duly appointed to a clerkship in the Post-office Department, in class —, in the division known as the money-order office, at an annual salary of $900.00; which position he held up to February 4, 1889, when he was at his own request duly transferred to the Treasury Department, and was assigned to the branch then known as the Sixth Auditor's office, at the salary of $900.00 per annum; that on the 31st day of October, 1890, he was, upon examination, duly promoted to class 1 in said Sixth Auditor's office, which clerkship he held up to March 16, 1893; that on the said 16th day of March, 1893, he was, at his own request, on the certification of the Civil Service Commission, transferred to the Department of the Interior and assigned to a clerkship in class 1 in the Pension Bureau, at the salary of $1,200 per year, which he continued to hold until March, 1894, and at this salary continued in said bureau as such clerk, but was reduced to the salary of $1,000 per annum on or about the 1st day of March, 1894, at which last-named salary he continued to serve as such clerk up to July 31, 1894, when he was formally discharged from said service, without any fault of his own and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at all times since said last-named date stood ready and willing to discharge the duties thereof;

16 that the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, which recommendation was based upon false and fraudulent representations by his subordinates as to the efficiency record of your petitioner, directed his discharge from said office, as aforesaid; that at the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of your petitioner, and his said services are now required therein; that the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, did retain at the time of the discharge of your petitioner, as aforesaid, and now retains one Charles E. Bookwalter and other clerks of the same division, who have received since his said discharge and are now receiving the same salary, to wit, $1,000 per annum (except that said Bookwalter receives $1,200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who were not found at the time of petitioner's said discharge to possess better business capacity for the proper discharge of the duties of their said offices than the required qualifications for said duties possessed by your petitioner at the time of his said discharge; that on or about the day your petitioner received notice of his said discharge additional clerks were appointed to duties in the same division in which petitioner served in said bureau, who were not honorably discharged from the military or naval service

of the United States and who never rendered any military or naval service whatever.

4. Your petitioner further says that he was efficient in the discharge of his duties as such clerk, and was able to and did discharge with efficiency the said duties; that he was faithful in his attendance upon his said duties, sober and industrious therein, and fell short of nothing with regard thereto; that the efficiency record ordered to be and which was kept in said Pension Bureau will show that your petitioner possessed the business capacity necessary for the proper discharge of the duties of his said office, both prior to and at the time of his discharge, and that he did at the time of his said discharge and does now possess the necessary business capacity for the proper discharge of the duties of his said office.

5. For first cause of action herein your petitioner alleges that during the time he was such clerk in the Pension Bureau he faithfully discharged all the duties required of him in the month of July, 1894; that he was not absent from said bureau in and during the calendar year 1894 more than thirty days' "annual leave" and thirty days's "sick leave" prior to his said discharge, as aforesaid; that he was and is entitled to an annual salary of $1,000, and during said month of July, 1894, was and is entitled to the sum of $84.20, payable semi-monthly, according to the practice of the Pension Office; that instead of said sum of $84.20 on account of salary, as aforesaid, he received the sum of $48.90, leaving due him from the defendant and wholly unpaid $35.30, which sum has been refused him, although payment thereof has often been requested.

6. For second cause of action herein your petitioner alleges that there is justly due him from the United States the salary of his said clerkship from the 31st day of July, 1894, to this date, to wit, $1,000 per annum, or a total sum due and unpaid, as such salary, of $3,417.00 under the act entitled "An act to regulate and improve the civil service of the United States," approved January 16,
17 1883, and acts amendatory thereof, and also under section 1754, R. S. U. S., and the statutes supplemental thereto, found at page 120, Supplement R. S. U. S., volume 1.

7. And your petitioner says that there remains due and unpaid to him from the defendant on account of both said causes of action the sum of three thousand four hundred fifty-two dollars and thirty cents.

Wherefore your petitioner demands judgment against the defendant in the sum of $3,452.30 and all proper relief in the premises.

MORRIS KEIM, *Petitioner.*

DISTRICT OF COLUMBIA, *City of Washington,* } *ss:*

Morris Keim, being duly sworn, upon his oath says that he is the petitioner in the above-entitled cause; that he has read the foregoing petition and understands the same; that the matters therein stated upon his personal knowledge are true, and that those matters therein stated upon information and belief he believes to be true.

MORRIS KEIM.

Subscribed and sworn to before me this 7th day of January, 1898.

DIRRELLE CHANEY,
Commissioner.

CHANEY & GARRISON,
Claimant's Attorneys.

18 VII.—*Judgment of the Court.*

MORRIS KEIM
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At a Court of Claims held in the city of Washington on the 21st day of March, A. D. 1898, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Morris Keim, be dismissed.

BY THE COURT.

19 VIII.—*Application of Claimant for and Allowance of Appeal.*

Comes the claimant, by his attorney herein, and petitions the court for an appeal to the Supreme Court of the United States from the findings and judgment of this court rendered in the above entitled cause March 21, 1898, and says:

1. That the Court of Claims erred in not granting the claimant's findings set out in finding 6 of the court's findings and in not finding that the claimant was equally qualified for the discharge of his duties with other clerks in the same bureau who had not been honorably discharged from the military or naval service of the United States.

2. That the court erred as a conclusion of law in dismissing the claimant's petition and in not giving claimant judgment for $3,452.30, as in his said petition claimed.

CHANEY AND GARRISON,
Att'ys for Claimant.

Filed March 21, 1898.

Ordered that the appeal be allowed as prayed for.

BY THE COURT.

March 21, 1898.

20 In the Court of Claims.

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I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court

and the conclusion of law thereon, of the opinion of the court and the dissenting opinion, of the judgment of the court dismissing the petition, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 28th day of March, 1898.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

[Endorsed:] No. —. In the Supreme Court. Morris Keim *vs.* The United States. Appealed from the Court of Claims. Chaney & Garrison, appellant's attorneys.

Endorsed on cover: Case No. 16,848. Court of Claims. Term No., 278. Morris Keim, appellant, *vs.* The United States. Filed April 13th, 1898.